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Nos. 98-405 & 98-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,
Appellant, and

GEORGE PRICE, *ET AL.*,
Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,
Appellee.

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF OF APPELLANTS GEORGE PRICE, *ET AL.*

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INTRODUCTION

This Court's remand in *Bossier I*[1] called upon the D.C. District Court to address a legal issue under the Voting Rights Act of 1965: "[W]hether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." App. 45a. The D.C. District Court was to consider evidence that the Bossier Parish School Board ("Board" or "Appellee") violated an ongoing injunction in its federal court desegregation case, App. 51a, as well as facts the court apparently had excluded concerning the plan's dilutive effect on minority voting strength, App. 50a.

For a party seeking an affirmance, the Board advocates an unusually different opinion than the court below issued. The Board now seeks a legal standard it claims was not applied on remand: That preclearance of a voting change should be denied under § 5 only if the change has a "retrogressive purpose" to abridge or deny the right to vote on account of race. The Board's argument that "purpose" prohibits only voting changes adopted with the "purpose to retrogress" twists the statutory language and this Court's cases interpreting § 5 beyond recognition. This Court consistently has barred preclearance of voting changes adopted with any purpose that is racially discriminatory and has applied the comprehensive factual inquiry of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), in making that determination.

The Board next asks this Court for new fact findings that are contrary to many of the findings and the parties' stipulations. The reason is apparent: If any court ever applied the *Arlington Heights* standard to the facts actually found and stipulated, as Judge Gladys Kessler has done twice, the Board will lose this case. This Court should reject out of hand the Board's invitation to make new fact findings in the

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1 *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997), Appendix to the Jurisdictional Statement ("App.") at 29a-77a.

course of resolving the legal issue presented on this appeal. [2]

I. SECTION 5 PROHIBITS PRECLEARANCE OF VOTING CHANGES ADOPTED WITH ANY RACIALLY DISCRIMINATORY PURPOSE.

Voting changes should be denied preclearance if they have the effect of retrogression or if purpose to discriminate on the basis of race or color is identified through the analysis outlined in *Arlington Heights*.

A. The Statute Itself. The plain language of § 5 makes clear that the "purpose" and "effect" prongs provide different protections. Congress provided that if a covered jurisdiction can demonstrate that a voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," it should be granted preclearance. 42 U.S.C. § 1973c. The "purpose" inquiry focuses on the contemporary motivation for the proposed voting change: "*does not have* the purpose." Congress' use of the present tense is consistent with the principle that analysis of discriminatory intent focuses on the state of mind of the actor at the time of the act. *See, e.g., McKennon* v. *Nashville Banner Pub. Co.*, 513 U.S. 352, 359-60 (1995); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 250, 252 (1989); *id.* at 260-61 (White, J., concurring), *id.* at 261 (O'Connor, J., concurring). The "effect" analysis is different. It calls for a prediction of the impact of the voting change in the future: "*will not have* the effect." For a voting change such as a districting plan, "effect" is measured by comparing the impact of the present plan to the projected impact of the proposed plan. *See Beer* v. *United States*, 425 U.S. 130 (1976).

Appellee is incorrect that *Beer* construed the words "denying or abridging the right to vote on account of race or color" to limit both the "purpose" and "effect" inquiries to retrogression. Appellee's Brief ("Bd. Br.") at 17-19. The

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[2] Appellee's "mootness" argument was addressed in the Brief of George Price, *et al.*, Opposing Motion to Dismiss or Affirm at 2-4.

Beer Court made clear that retrogression is inherent in the word "effect":

> It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the "effect" of diluting or abridging the right to vote on account of race within the meaning of § 5.

425 U.S. at 141. The Court in *Beer* harmonized its holding with *City of Richmond* v. *United States*, 422 U.S. 358 (1975), stating that *Richmond* "decided when a change with an adverse impact on previous Negro voting power met the 'effect' standard of § 5." 425 U.S. at 139 n.11. Because the voting change in *Beer* was ameliorative with respect to the voting power of African-Americans, it had no "effect" prohibited by § 5. *See Bossier I*, App. 46a ("we have adhered to the view that the only 'effect' that violates § 5 is a retrogressive one," citing *Beer*, 425 U.S. at 141 and *City of Lockhart* v. *United States*, 460 U.S. 125, 134 (1983)).

If "purpose" were limited to retrogressive intent, purpose would be virtually read out of § 5. It is difficult to imagine public officials having the "purpose" to retrogress in adopting a voting change which cannot be projected to result in retrogression. Yet under Appellee's submission, that would be the universe of plans subject only to the "purpose" prong of § 5. An actually retrogressive voting change would be covered by the "effect" prong, with the "purpose" prong adding no evident protection. Section 5 should be read in a way that satisfies the Court's "duty to give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). *See Heckler* v. *Chaney*, 470 U.S. 821, 829 (1985); *United States* v. *Albertini*, 472 U.S. 675, 680-82 (1985).

Limiting "purpose" to "purpose to retrogress" also fails to square with the Court's holding in *Bossier I* that, in conducting the purpose inquiry, "courts should look to our decision in *Arlington Heights* for guidance." App. 48a. While the effect of the official action is a factor encompassed in the *Arlington Heights* inquiry, it is not dispositive.

Arlington Heights counsels that a court weighing discriminatory intent also should examine the historical context, sequence of events leading to the decision, contemporaneous statements of public officials, and other probative evidence. 429 U.S. at 267-68. If "purpose" were limited to intent to retrogress, where a voting change is not retrogressive it is difficult to imagine why the inquiry would proceed beyond consideration of the "effect."

Limiting application of § 5 only to retrogressive voting changes also would create vexing issues when changes are considered that do not lend themselves readily to the now well-developed vote dilution or other mathematical analyses. Section 5 covers many voting changes other than reapportionment, including procedural and residency requirements,[3] and leave policies for campaigning employees.[4] The Court should decline to adopt a rule of law ill-suited to protect against discrimination in the full range of voting practices covered by § 5.

Limitation of purpose to "purpose to retrogress" would leave minority voters in jurisdictions like Bossier Parish vulnerable to some forms of intentional racial discrimination. Nothing in § 5 suggests that some category of covered voting changes enacted by covered jurisdictions should evade any meaningful § 5 review because the mathematical possibilities for retrogression are absent or obscure. The Board's proposed plan should not be exempted from full *Arlington Heights* scrutiny for discriminatory purpose solely because it is impossible to retrogress from zero.

B. This Court's § 5 Decisions. Appellee claims that "*stare decisis* principles demand fidelity to *Beer* and *Lockhart*," Bd. Br. at 23 n.17. Appellants agree. *Stare*

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3 *See Hadnott* v. *Amos*, 394 U.S. 358, 365-66 (1969); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 551 (1969) (discussing consolidated case, *Whitley* v. *Williams*); *City of Rome* v. *United States*, 446 U.S. 156, 160-61 (1980).

4 *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 38-43 (1978).

decisis has "special force" in cases involving statutory interpretation. *See Cedar Rapids Community Sch. Dist.* v. *Garret F.*, 119 S. Ct. 992, 999 n.10 (1999), citing *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989). *See also Holder* v. *Hall*, 512 U.S. 874, 886 (1994) (O'Connor, J., concurring in part and concurring in the judgment). The application of principles of *stare decisis* should not be limited here, however, to *Beer* and *Lockhart*.

1. At oral argument of *Bossier I*, counsel for the Board cited *Richmond* and *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987), for the proposition that "purpose" under § 5 is not limited to purpose to retrogress. Transcript of Oral Argument, 1996 WL 718469, at 30-31. He was correct.

Richmond would not have resulted in a remand for further development of the facts concerning discriminatory purpose if "purpose" had been limited to intent to retrogress. Although Appellee claims that the annexation at issue was "retrogressive," Bd. Br. at 30, the *Richmond* Court ruled that the annexation did not have a prohibited "effect" because the post-annexation election system fairly recognized minorities' political potential in the expanded jurisdiction. The Board claims that "[t]he Court . . . remanded the case to insure that the motivation behind the annexation was not to cause such obvious *retrogression* in black voting strength, but was done for 'verifiable, legitimate reasons.'" Bd. Br. at 31, quoting *Richmond*, 422 U.S. at 375 (emphasis in original). The word "retrogression" is nowhere to be found on the cited page nor anywhere in *Richmond's* remand directive.

The purpose inquiry in *Richmond* was not preempted by a finding that the voting change lacked a retrogressive effect:

> An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color. . . . An annexation

> proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, whatever its actual effect may have been or may be.

422 U.S. at 378-79.

In *Pleasant Grove,* decided after *Beer,* the Court held that proposed annexations of land that was vacant or inhabited by a few whites did not have a present effect on black voters in the city, since there were no black voters in the city. 479 U.S. at 470-71. Despite that, the Court held that the city had failed to carry its burden of demonstrating a lack of discriminatory purpose within the meaning of § 5. *Id.* at 472. The Court made clear that "purpose" is not limited to present circumstances and can contemplate future effects, *see* Bd. Br. at 28-29, but the analysis went further. The Court found the city's argument "also incorrect insofar as it implies that a covered jurisdiction can short-circuit a purpose inquiry under § 5 by arguing that the intended result was not impermissible under an objective effects inquiry. . . . We rejected such reasoning in *City of Richmond*. . . ." 479 U.S. at 471 n.11. *Pleasant Grove* would have resulted in a reversal and preclearance of the annexations if the only purpose comprehended by § 5 is purpose to retrogress, since no retrogression could have been involved.

2. The Appellee dismisses *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd,* 459 U.S. 1166 (1983), arguing that "the primary flaw in *Busbee* was that the submitting jurisdiction had 'split a cohesive black community in Districts 4 and 5,'" Bd. Br. at 30 n.23, quoting 549 F. Supp. at 498-99. The D.C. District Court in *Busbee* found that the overall "plan does not have a discriminatory effect," since the one majority black district in the previous districting plan remained in the new plan, and gained a few percentage points in black population. 549 F. Supp. at 516, citing *Beer,* 425 U.S. at 141. The splitting of the cohesive black communities in *Busbee* was highly relevant to the finding of discriminatory purpose. *Id.* at 517. This Court's summary affirmance can mean something other than agreement with the finding of discriminatory purpose, not limited to retrogressive intent,

only through a chain of logic something like this: This Court rejected the D.C. District Court's conclusion of no retrogressive effect; it adopted a definition of retrogression, at odds with *Beer,* that encompassed splitting of cohesive black communities even where one black majority district existed in the old and in the proposed plans; and it silently affirmed on that basis. It is inconceivable that the Court did this rather than accept the thorough and careful findings that the districting plan was infected with racial *animus*.

3. *Beer* itself took care to explain that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141. Appellee would have those words mean only that some separate constitutional case can be brought to attack a discriminatory but ameliorative voting change. Bd. Br. at 33. The Court, however, addressed whether an ameliorative apportionment can *"violate § 5,"* because it discriminates. *Accord Richmond,* 422 U.S. at 378-79 (a discriminatory voting change "has no legitimacy at all under our Constitution *or under the statute"* and *"is forbidden by § 5,* whatever its actual effect may have been or may be") (emphasis added)).

Section IV of Appellee's Brief addresses musings "raised by *dicta* in *Beer,*" Bd. Br. at 33, not by the questions presented in the Jurisdictional Statements, decided by the court below, or argued by the Appellee during the long course of these proceedings. Appellee embarks on this excursion because it needs to find some meaning for the language in *Beer* other than the apparent one: That § 5 prohibits preclearance of voting changes adopted with a discriminatory intent that is not retrogressive. Section IV of Appellee's Brief suggests the morass of legal issues that awaits if the Court restricts "purpose" to "purpose to retrogress."

C. The Principle Prohibiting Discriminatory Governmental Action. Appellee makes much of the statement in *Beer* that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial

minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141, quoted in Bd. Br. at 17 n.13, 20. This statement stands alongside powerful assertions that "the basic purpose of Congress in enacting the Voting Rights Act was 'to rid the country of racial discrimination in voting,'" and that "[s]ection 5 was intended to play an important role in achieving that goal." *Beer*, 425 U.S. at 140, quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966). *Accord Bossier I*, App. 33a ("[t]he Voting Rights Act of 1965. . .was enacted by Congress in 1964 to 'attac[k] the blight of voting discrimination' across the Nation," quoting S. Rep. No. 97-417, at 4 (1982). Appellee suggests that § 5 reaches only voting changes adopted with the "intent to increase discrimination against minorities," Bd. Br. at 18-19, as if there is some acceptable level of racial discrimination in official acts regarding voting. That is contrary to the purpose and reach of § 5.

In the 1970 Voting Rights Act, Congress banned the use of any "test or device" as a prerequisite for voting or registration, 42 U.S.C. § 1973aa, thus stamping out some of the most flagrant means by which African-Americans had been denied the opportunity to vote at all. By requiring in § 5 that jurisdictions that had engaged in the most widespread voting discrimination preclear changes in voting practices and procedures, Congress did "freeze" voting practices. There is no reason to think, however, that Congress accepted that *status quo* as non-discriminatory as long as things got no worse for African-American voters.

It is unsurprising that Congress would bar preclearance of voting changes that are motivated by discriminatory animus, even voting changes that otherwise are valid. Anti-discrimination statutes -- and the constitutional amendments they enforce -- routinely prohibit conduct that would be legal and appropriate if motivated by legitimate goals. *See Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (striking down San Francisco laundry permit ordinance deliberately enforced to prevent Chinese from operating laundries); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 341 (1960) (reinstating claim that

Alabama legislature's change in boundaries of City of Tuskegee from a square to a "strangely irregular twenty-eight-sided figure" was intended to deny Equal Protection to excluded African-Americans). A municipality has a legitimate interest in regulating laundries to avoid the danger of fire. States have authority to draw municipal boundaries. But where such acts are designed to exclude persons on the basis of race or nationality, even where the pattern of exclusion is stark "it was the presumed racial purpose of state action, not its stark manifestation, that was the constitutional violation." *Miller* v. *Johnson*, 515 U.S. 900, 913 (1995). *Accord Rogers* v. *Lodge*, 458 U.S. 613, 617 (1982) ("'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose,'" quoting *Washington* v. *Davis*, 426 U.S. 229, 240 (1976)).

Federal courts generally refrain from reviewing the merits of legislative and administrative decisions because they are owed deference in the effort to balance competing considerations. *Arlington Heights*, 429 U.S. at 265. But "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Id.* at 265-66. As authority for the proposition that even a single governmental act, lacking a pattern of official discrimination, is not immune from scrutiny for discriminatory intent, Justice Powell cited the page in *Richmond* that explained the reason for the remand to consider discriminatory purpose under § 5. *Id.* at 266 n.14, citing 422 U.S. at 378. Because "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end," *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105, 114 (1918), quoted in *Richmond*, 422 U.S. at 379, preclearance should be denied to any voting change adopted with a purpose to discriminate, as identified by the *Arlington Heights* analysis.

II. WHEN THE CORRECT LEGAL STANDARD IS APPLIED TO THE STIPULATIONS AND THE FINDINGS OF FACT, PRECLEARANCE SHOULD BE DENIED.

The D.C. District Court held that "[t]he question we will answer. . . is whether the record disproves Bossier Parish's *retrogressive intent* in adopting the Jury plan." App. 4a (emphasis added). Judge Kessler, in dissent, argued that her "colleagues have limited their § 5 purpose inquiry to a search for intent to retrogress," App. 13a, which the majority did not deny.

What Appellee characterizes as a "fact finding" by the D.C. District Court that the Board's redistricting plan was not motivated by discriminatory intent is a confused recitation of legal standards and questions presented in the opinion below, that is further confounded in Appellee's presentation. Contrary to Appellee's submission, the D.C. District Court did not make a clear finding on the record before it that there was no intent to discriminate in any way, including any intent to retrogress. Bd. Br. at 12. The D.C. District Court made two general statements about the facts concerning intent and whether they demonstrate only a purpose to retrogress or a broader discriminatory purpose:

First, it said that "the record will not support a conclusion that extends beyond the presence or absence of retrogressive intent." App. 3a. This statement is inscrutable. It is not a finding one way or the other on whether there is evidence of intent beyond intent to retrogress. It seems to assume that all of the record evidence concerning the Board's purpose goes to the issue of intent to retrogress, which makes no sense with respect to a voting plan that is not retrogressive.

Second, the court stated that it could "imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory, purpose,' but those imagined facts are not present here." App. 3a-4a, quoting *Bossier I*, App. 46a. The court did not describe what facts it could "imagine." A "finding" that the facts in this case do not measure up to a

standard set by unrevealed "imagined" facts cannot be called a fact finding to which this Court owes deference.

The case now is back before this Court for resolution of an issue of law concerning the meaning of "purpose" in § 5. The correct legal principle can be applied by this Court to the record because it is largely stipulated, App. 145a-232a, and was not reopened on the last remand. Application of the proper legal principle to the stipulations and fact findings warrants reversal and rejection of the Board's districting plan. Appellee's efforts to overreach that record are inappropriate here and inaccurate, as demonstrated by the examples that follow.

A. The NAACP Plan and Precinct-Splitting. The Board attempts to sow confusion when it asserts that it was faced with a choice between the NAACP plan and the Police Jury plan in late 1992 and had no choice but to adopt the Jury plan because the NAACP plan split precincts and thus was a facial violation of state law. Bd. Br. at 2-4, 20-21, 44-48. These assertions rest on a fundamental misunderstanding of the NAACP plan.

The NAACP plan was never offered as a "take it or leave it" proposal. Mr. Price presented it to prompt examination of whether majority-black districts could be part of the overall districting plan. Indeed, Mr. Price originally provided a drawing of only two election districts, to illustrate the point:

> The NAACP did not draw a complete plan because they were most interested in demonstrating ways to more fairly reflect black voting strength and did not want to raise issues as to the other districts: the School Board was free to draw them in any way they chose.

App. 177a, ¶ 99. Mr. Price was rebuffed not because the two districts would require precincts to be split, but because a Board official told him "he would need to come up with a plan that contained all twelve districts." *Id.* The Board never undertook what Mr. Price requested: Incorporation in the

Board's own planning of an effort to unify black communities into election districts.[5]

The configuration of precincts was a "barrier" to the drawing of majority African-American districts only because the Board allowed it to be. "[T]he parties have stipulated that school boards redistricting around the time . . . were 'free to request precinct changes from the Police Jury necessary to accomplish their districting plans.'" App. 84a, quoting Stipulation ¶ 23 (App. 151a). The Police Jury has power, subject to provisions of Louisiana law, "to change the configuration, boundaries, or designation of an election precinct." La. R.S. 18:532.1(A) (J.A. 385).

The D.C. District Court found that "[w]hen the School Board began the redistricting process, it likely anticipated the necessity of splitting some precincts. It hired the Police Jury's cartographer with the expectation that he would spend a substantial amount of time on the project." App. 108a. Indeed, the Board's cartographer gave precinct maps to the Board members, telling them that "they would have to work with the Police Jury to alter the precinct lines." App. 174a, ¶ 89. When the NAACP plan was presented and "summarily dismissed" by the Parish District Attorney and the Board's cartographer for the stated reason that it "crossed existing precinct lines, and therefore violated state law," they "were aware of the option of obtaining precinct line changes from the police jury." App. 179a, ¶ 102.

The D.C. District Court was correct that the Board could adopt a plan with precincts different from the Police Jury plan and work out an acceptable accommodation under Louisiana law.[6] First, state law provided a window from April 1, 1991

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[5] Appellees are incorrect that the NAACP plan "was drawn by William Cooper for the exclusive purpose of 'creat[ing] two majority black districts,'" Bd. Br. at 3 (quoting Mr. Cooper's testimony about a different plan at J.A. 371), since Mr. Cooper did not draw the NAACP plan at all. *See* App. 83a; 177a, ¶ 98.

[6] The Board claims that "Appellants' contention that such precinct splits are 'common' is . . . misleading." Bd. Br. at 46.

to May 15, 1991 within which the Police Jury could divide precincts in order to meet applicable state and federal guidelines in the creation of its reapportionment plan. La. R.S. 18:532.1.H.(2) (J.A. 389). The Police Jury developed its plan, which created new precincts, in this window. *See* App. 162a-165a, ¶¶ 58-63.[7] Had the Board begun its redistricting earlier, it could have worked with the Police Jury to develop precincts during the 1991 window that would accommodate a different plan. Second, the Board is incorrect that it was legally impossible for the Board, after missing the 1991 precinct change window, to adopt a plan that would require Police Jury approval of precinct changes because the Board had to act before December 31, 1992 but the Police Jury next could consolidate precincts only after January 1, 1993. Bd. Br. at 3. The Board could have adopted a plan before December 31, 1992, as it did, and asked the Police Jury actually to accomplish the precinct changes necessary after January 1, 1993. There was no School Board election until 1994, so the Board and Police Jury had ample time to work together.

The D.C. District Court cited witness testimony that precinct splits were "quite common," App. 107a, and that the witness had "routinely drawn redistricting plans that split precincts," App. 84a. The parties stipulated that two other parish school boards accomplished their recent redistricting by requesting precinct changes from their police juries; the Board's cartographer testified that the practice "is not unheard of, it has been done in other places." App. 151a, ¶ 23. Appellee offers no citation, or record support, for the proposition that the Board and Police Jury "nad *never* split precinct lines." Bd. Br. at 3 n.2.

[7] If the Board is trying to imply that the Police Jury could not split existing precincts even to create its own redistricting plan, Bd. Br. at 3 n.2, that is incorrect, since "20 new precincts were created when the 1991 Police Jury plan was drawn," App. 167a, ¶ 70. The parties stipulated that "[p]recinct realignments are a normal practice within Bossier Parish, occurring every three or four years. Bossier Parish has made a number of such precinct realignments within the last ten years." App. 155a, ¶ 38. At the time of trial, the Board's cartographer was working with the Police Jury on precinct consolidations. J.A. 273-275 (Joiner).

Finally, it is not the position of appellants that it was a violation of any law for the Board not to adopt the NAACP plan. The Attorney General's letter denying preclearance explained that "while the School Board was not required to 'adopt any particular plan, it is not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice.'" App. 86a, quoting App. 235a. The NAACP plan provided the context in which the Board addressed the question of drawing majority-black districts. When confronted with that option, the Board ran to a plan it previously had rejected and "never approached the Police Jury to request precinct changes." App. 84a. The Board never asked the cartographer "to approach the Police Jury to request that the precinct lines be redrawn to enable the creation of majority-black School Board districts." App. 188a, ¶ 128.

B. Traditional Districting Principles. Appellee argues that the NAACP plan subordinates traditional redistricting principles "because it is not compact," Bd. Br. at 3 (footnote omitted), and disavows a stipulation that a reasonably compact majority-black district could be drawn in Bossier City, App. 154a, ¶ 36.[8] This new argument ignores the parties' further stipulation that the majority-black district in Bossier City in the Cooper plans "is an acceptable

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8 Appellee does not attempt to demonstrate that this case presents the "exceptional circumstances" or "manifest injustice" which must be shown to overturn stipulations, particularly after judgment. *See, e.g., Feazell* v. *Tropicana Prods., Inc.*, 819 F.2d 1036, 1040 (11th Cir. 1987) ("[m]atters stipulated to in a pretrial order are binding on the parties unless modified and normally cannot be objected to on appeal"); *Cooperative Servs., Inc.* v. *Dep't of Housing and Urban Dev.*, 562 F.2d 1292, 1294 (D.C. Cir. 1977); *United States* v. *3,788.16 Acres of Land*, 439 F.2d 291, 294-95 (8th Cir. 1971). Appellee's failure to seek relief in the trial court defeats its effort to escape the stipulations here. *See Jauregui* v. *City of Glendale*, 852 F.2d 1128, 1134 (9th Cir. 1988); *Mull* v. *Ford Motor Co.*, 368 F.2d 713, 716 (2d Cir. 1966); *Osborne* v. *United States*, 351 F.2d 111, 120 (8th Cir. 1965).

configuration from the standpoint of district shape." App. 194a, ¶ 150.[9]

Moreover, there is no district court finding in *Knight* v. *McKeithen* that it is impossible to draw a reasonably compact majority-black election district in Bossier City, as Appellee contends. Bd. Br. at 4 n.3. To the contrary, the court in that separate litigation stated from the bench that it was "not comfortable" with the first Cooper plan, but had "not had sufficient time or sufficient evidence presented to convince [it] that some other plan, which complies with Section 2 of the Voting Rights Act, cannot be drawn that will recognize compactness . . . ." J.A. 51.

The Board fails to disclose that, under the statistical test for compactness used by the Board's own cartographer, at least four of the 12 election districts in the Jury plan fail. App. 191a, ¶ 139.[10] The alternative configurations drawn by Mr. Cooper for a second minority district in the relatively sparsely populated northern part of Bossier Parish are "virtually identical in length to the School Board's proposed district configuration and cover[ ] 40 percent less land area." App. 194a, ¶ 149.

Appellee's efforts now to have this Court hold that incumbency was not a problem in the Police Jury plan, Bd. Br. at 48, fly in the face of the D.C. District Court's finding that "[t]he Police Jury plan wreaked havoc with the incumbencies of four of the School Board members. . . ." App. 106a. Two pairs of Board incumbents were pitted

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9 The first Cooper plan was a proposed interim election plan that the Price Appellants provided to the court in *Knight* v. *McKeithen*, No. 94-848-A2 (M.D. La.), as an option when the Board lacked a precleared election plan for the scheduled 1994 elections. App. 193a, ¶ 147. The Board proposed that the Police Jury plan be ordered instead; the court declined to order either. J.A. 51-52.

10 The Board also offers no response to the uncontested fact that the Police Jury plan exceeds the one-person-one-vote standard in Louisiana law. *See* App. 181a-182a, ¶ 109.

against each other and, unsurprisingly, in each pair one member had decided not to run by the time of the testimony below. The citations in Appellee's Brief do not support any inference that the Police Jury plan met the Board's incumbency concerns.

The Board derides "appellants' newly-minted principle" that school board members sought location of schools in their election districts. Bd. Br. at 48. In fact, the parties stipulated the "School Board members . . . are typically concerned with having a public school or schools in each district." App. 151a, ¶ 24.

It is characteristic of the Board's treatment of the facts that it notes the support of the one black Police Juror -- Jerome Darby -- for the Jury plan, Bd. Br. at 44, as if to endorse its fairness to the black community. Mr. Darby testified below that he "was deliberately misled" with regard to the possibility of drawing majority-minority election districts in the parish, and that "[i]f [he] had known then what [he] know[s] now, [he] would have voted against the Police Jury plan." J.A. 135-36. The parties have stipulated that this testimony is true. App. 165a, ¶ 64.

C. Election Results. The Board seeks "judicial notice" of two sets of Board election results under the Police Jury plan. The "1994 election" results[11] were available when the Court remanded this case in 1997, but the Board rejected the invitation to supplement the record. App. 1a, n.1. The D. C. District Court properly refused to take notice of the election results when the Board raised them in a reply brief, concluding that if it were to consider the election results, it "would need more information about them." *Id.* Where a district court refuses to take judicial notice of an adjudicative fact, the appellate court should reject that decision only upon a showing of abuse of discretion. *See O'Bannon* v. *Union Pacific R.R. Co.*, No. 98-2279, 1999 WL 47730 (8th Cir. Jan. 2, 1999); *Waid* v. *Merrill Area Public Schools*, 130 F.3d

[11] What the board calls "1994" elections, Bd. Br. at 5, apparently are those of March and April 1996.

1268, 1272 (7th Cir. 1997); *United States* v. *Mulderig*, 120 F.3d 534, 542 (5th Cir. 1997); *York* v. *American Tel. & Tel. Co.*, 95 F.3d 948, 958 (10th Cir. 1996).

The court below did not abuse its discretion, since the election results had not been subjected to the expert analysis of racial polarization and voter turnout that the parties conducted regarding previous elections. There also was no exploration of special circumstances that bear on their probative value, including the impact of the pending litigation. *See Thornburg* v. *Gingles*, 478 U.S. 30, 76 (1986) (district court properly considered whether "pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting"); *Solomon* v. *Liberty County Comm'rs*, 166 F.3d 1135, 1143-46 (11th Cir. 1999) (district court's reliance on electoral success of minority candidate during pendency of lawsuit to support finding of no vote dilution was clear error); *see also Clark* v. *Calhoun County*, 21 F.3d 92, 96 (5th Cir. 1994); *City of Carrollton Branch of NAACP* v. *Stallings*, 829 F.2d 1547, 1560 (11th Cir. 1987). The 1998 elections likewise are limited in probative value because they occurred while appellants were seeking this Court's review of the D.C. District Court decision.

On the first appeal to this Court, the Board tried to introduce the 1996 election results through a motion to supplement the record, which this Court denied. *Reno* v. *Bossier Parish Sch. Bd.*, 517 U.S. 1154 (1996). On this appeal, the Board does not attempt a motion but simply asserts the election results as if they were part of the record and considered below (which they were not) and as if election of African-Americans proves that the African-American community has elected its candidates of choice (which it does not). *See Gingles*, 478 U.S. at 76 n.27. The Board's strategic bypass of the trial court, where a factual inquiry could be fully and fairly accomplished, should not be rewarded with judicial notice of the one-sided presentation in its brief.

D. Resistance to Desegregation. The D.C. District Court found that the historical background of the adoption of the Police Jury plan "provides powerful support for the proposition that the Bossier Parish School Board in fact resisted adopting a redistricting plan that would have created majority black districts." App. 7a. The intent proved by the Board's resistance to school desegregation "is a tenacious determination to maintain the status quo." *Id.*[12]

The Board now seeks to overturn what it calls "appellants' suggestion" that the Board violated the desegregation decree when it disbanded a bi-racial committee. Bd. Br. at 49. In fact, it is a finding of fact that it asks this Court to reject:

> Part of [the] history is the school board's resistance to court-ordered desegregation, and particularly its failure to comply with the order of the United States District Court in *Lemon* v. *Bossier Parish School Board*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967), that it maintain a bi-racial committee to "recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." Stip. ¶ 111.

App. 7a.

The Board also concludes that "[t]here is no evidence that the school's alleged racial imbalance is attributable to the Board's conduct." Bd. Br. at 49. The Board provides no basis to infer that the increasing number of majority-black schools, to which the parties have stipulated (App. 218a, ¶ 241), is due to "demographic factors over which [the Board] has no control. *See Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992)." Bd. Br. at 49. *Freeman* teaches that a school

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12 The Board questions whether "the *status quo*" refers to the Police Jury plan or the 1980's Board plan. Bd. Br. at 16 n.12. In the context of the history of resistance to desegregation, the *status quo* is the ongoing Board reluctance to address the interests of the African-American community.

district seeking unitary status has the burden of demonstrating, among other things, "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." 503 U.S. at 492, quoting *Board of Educ. of Oklahoma City* v. *Dowell*, 498 U.S. 237, 249-50 (1991). The Board sought unitary status in 1979 and was denied. App. 217a, ¶ 239. It accordingly has the ongoing affirmative obligation to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *School Bd. of New Kent County*, 391 U.S. 430, 437-38 (1968). "[A] critical beginning point" in the analysis when the board next moves for unitary status will be "the degree of racial imbalance in the school district. . . ." *Missouri* v. *Jenkins*, 515 U.S. 70, 87 (1995), quoting *Freeman*, 503 U.S. at 474. How the Board can show that racially identifiable black schools result from demographic patterns while it claims that there are inadequate concentrations of African-American voters to form compact majority-black election districts is an interesting conundrum, but one that will be faced only when the Board again seeks unitary status and is put to its proof.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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